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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1566

TENNECO INC., a corporation, and TEXAS EASTERN TRANSMISSION CORPORATION, a corporation,

Petitioners,

v.

PUBLIC SERVICE COMMISSION OF WEST VIRGINIA, ELIZABETH V. HALLANAN, its Chairman, and ROBERT L. STEWART and MILFORD L. GIBSON, members of said Commission, and THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR THE RESPONDENTS IN OPPOSITION TO PETITION

The National Association of Regulatory Utility Commissioners (NARUC)[1] and the Public Service Commission of West Virginia submit the following brief in opposition to the Petition for a Writ of Certiorari to the United States

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[1] The NARUC is a quasi-governmental nonprofit organization founded in 1889. Within its membership are the governmental bodies of the fifty States and of the District of Columbia, Puerto Rico and the Virgin Islands engaged in the regulation of carriers and utilities. The mission of the NARUC is to improve the quality and effectiveness of public regulation in America. More specifically, the NARUC contains State officials, including the members of the West Virginia Public Service Commission, charged with the responsibility of participating in the national gas pipeline safety program in accordance with the provisions of the National Gas Pipeline Safety Act of 1968, as amended (49 U.S.C., Sec. 1671, *et seq.*).

Court of Appeals for the Fourth Circuit filed by Tenneco, Inc. and Texas Eastern Transmission Corporation (hereinafter sometimes called "companies" or "Petitioners").

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 489 F.2d 334 and is reprinted in the Appendix of the Petition, pp. A-1 through A-10. The opinion of the United States District Court for the Southern District of West Virginia is reported at 352 F. Supp. 719 and is reprinted in the Appendix of the Petition, pp. A-11 through A-16.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on December 19, 1973. On January 23, 1974, a petition for rehearing was denied. A petition for certiorari was, thereupon, filed with this Court on April 19, 1973. Jurisdiction has been invoked under 28 U.S.C., Sec. 1254(1).

QUESTION PRESENTED

Whether the West Virginia Commission is Preempted by the Natural Gas Pipeline Safety Act of 1968 from Assessing and Collecting from Interstate Pipelines a Special Fee to Aid in Defraying the Cost of Administering an Interstate Pipeline Safety Program as the Agent of DOT?

STATUTES AND REGULATIONS INVOLVED

This case involves pertinent provisions of the Natural Gas Pipeline Safety Act of 1968, as amended (49 U.S.C., Sec. 1671, *et seq.*). Particular emphasis is placed on Section 5(c)(1) of the Act of 1968, set forth as Appendix A to this brief, and the amended version of that section set out in the Appendix of the Petition at A-26. 49 U.S.C., Sec. 1674(c)(1).

This case further involves a regulation of the Department of Transportation (49 C.F.R., Sec. 190.6) concerning States acting as agents of the Department, and pertinent provisions of the West Virginia Gas Pipeline Safety Act (W. Va. Code Ann., Sec. 24B-1-1, *et seq.*), especially Section 24B-5-3 of that Act as set forth in the Appendix of the Petition at A-27.

STATEMENT OF THE CASE

In June, 1970, the Public Service Commission of West Virginia assessed fees of $2,375.33 against Tenneco, Inc. and $1,077.44 against Texas Eastern Transmission Corporation to aid in defraying the cost to the West Virginia Commission of administering an interstate pipeline safety program as the agent of the Department of Transportation (DOT).

The validity of the agency relationship between the West Virginia Commission and the DOT has never been contested. However, shifting grounds somewhat as they move from arena to arena, the companies have attempted (unsuccessfully) to convince the West Virginia Commission, the DOT, the Congress, the District Court for the Southern District of West Virginia, and the United States Court of Appeals for the Fourth Circuit that the assessment of

fees against them is invalid. Now the companies are embarked on a similar enterprise before this Court. The fees remain unpaid.

The Public Service Commission of West Virginia was authorized by the passage in 1969 of the West Virginia Gas Pipeline Safety Act (W. Va. Code Ann., Sec. 24B-1-1, *et seq.*) to participate in the gas pipeline safety program "to the extent permitted by the 'Act of 1968'[2] and any amendments thereto." W. Va. Code Ann., Sec. 24B-2-1.

To help fund the Commission's participation, the West Virginia legislature directed that every pipeline company engaged in the operation of pipeline facilities or the transportation of gas in the State shall pay a special fee, that the sum of such fees shall "produce a revenue of not more than ninety thousand dollars per annum," and that such fees "shall be paid into the state treasury and kept as a special fund" to pay the Commission's salaries and expenses. W. Va. Code Ann., Sec. 24B-5-3(a)(b), reprinted in the Appendix of the Petition, pp. A-27 through A-28.

The Natural Gas Pipeline Safety Act of 1968 (P.L. 90-481, 82 Stat. 720, 49 U.S.C., Sec. 1671, *et seq.*) was adopted on August 12, 1968. It was Congress' and the Administration's response to the increasing safety hazards posed by the rapid growth of the natural gas industry and the proliferation of gas pipeline throughout the country. The purpose of the bill was to "provide for the prescription and enforcement of minimum Federal safety standards for the transportation of natural and other gas by

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[2] The "Act of 1968" is defined as "the Act of Congress known as the Natural Gas Pipeline Safety Act of 1968." W. Va. Code Ann., Sec. 24B-1-2(11).

pipeline and for pipeline facilities." H.R. Rep. No. 1390, *U.S. Code Cong. & Adm. News*, 90th Cong., 2d Sess. 3223 (1968).

The DOT was authorized to prescribe the minimum Federal safety standards. Section 3 (49 U.S.C., Sec. 1672). Congress recognized that many States were already actively engaged in the regulation of pipeline safety practices (H.R. Rep. No. 1390, *supra*, at 3228, 3255-3261) and provided explicitly for the continuing involvement of the States in the administration of the national safety program. *Id.*, at 3241-3245.[3]

As one inducement for the States to play an effective role in the administration of the safety program, Congress authorized the DOT to pay to the States part of the cost for their participation under certification or agreement

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[3] The continuing importance of the States in the administration of the national program is demonstrated by many provisions of the Act itself, including: 1) The adoption of State standards then in existence as the interim Federal standards [Section 3(a)] [49 U.S.C., Sec. 1672(a)]; 2) The authorization to the States to adopt more stringent standards for facilities not subject to FPC jurisdiction [Sections 3(a)(b)] [49 U.S.C., Sec. 1672(a)(b)]; 3) The authorization to the States, through certification and agreement procedures, to administer comprehensive safety programs with respect to gas systems other than interstate pipelines [Sections 5(a)(b)] [49 U.S.C., Sec. 1674(a)(b)]; 4) The inclusion within the Technical Pipeline Safety Standards Committee of State commissioners, two of whom are to be appointed only after consultation with the NARUC [Section 4(a)(1)] [49 U.S.C., Sec. 1673(a)(1)]; 5) The authorization to reimburse the States "up to 50 per centum of the cost" for their participation by certification or agreements [Section 5(c)(1)] [49 U.S.C., Sec. 1674(c)(1)]; and 6) The requirement placed on the DOT to report annually on the extent of State participation in the program [Section 14(a)(9)] [49 U.S.C., Sec. 1683(a)(9)].

with the DOT. Section 5(c)(1) of the 1968 Act authorized the DOT to pay *up to 50 per centum of the costs* for such State participation out of funds "appropriated or otherwise made available" when the DOT is satisfied that the remaining costs of the program will be provided by the States and that State expenditures from their own sources will not drop below their expenditures for fiscal years 1967 and 1968. Section 5(c)(1) of P.L. 90-481 (82 Stat. 722) (49 U.S.C., Sec. 1674(c)(1)), reprinted in the Appendix to this brief on p. 1a. This section was amended in 1972 to authorize the DOT to make similar payments to States acting as agents for the DOT with respect to interstate transmission facilities and to make mandatory the expenditure of funds appropriated by Congress for the grant-in-aid program. Section 2 of P.L. 92-401 (86 Stat. 616). The amended version of 49 U.S.C., Sec. 1674(c)(1) is reprinted in the Appendix of the Petition, at A-26.

At no time has Congress authorized the expenditure of Federal funds to pay more than 50 per centum of State costs for participating under certifications or agreements with DOT or for participating as the agents of the DOT.

Further, as the Court of Appeals noted:

> On appeal the companies make no contention that the fees unconstitutionally burden interstate commerce or that they are disproportionate to the state's share of the cost of conducting safety surveillance of their interstate pipelines.
>
> Pet., App., at A-3.

The concept of agency relationships between State Commissions and the DOT was conceived and put into effect by the DOT only several months after the passage of the 1968 Act. The Office of Pipeline Safety (OPS) of the

DOT had no field enforcement staff to provide surveillance over interstate transmission facilities. Many States had staff available to perform that function. The DOT, thereupon, invited those State commissions, properly authorized by State law, to act as agents in providing such surveillance. 49 C.F.R., Sec. 190.6. It was conceived as "an effort to continue in effect the level of safety regulation over interstate transmission facilities which existed [from State efforts] on August 12, 1968. . . ." DOT, *Federal-State Relations in Gas Safety, Report to Congress*, at 9 (1973). See also, 33 Fed. Reg. 16504 (November 13, 1968).

The agency concept has remained an integral part of the safety program. When the interim Federal standards were superseded by Federal safety standards, DOT-State Commission agency relationships were explicitly continued. 35 Fed. Reg. 13249-50 (August 19, 1970).

Congress has been kept informed about the agency program.[4] In fact, as indicated above, Congress in 1972 authorized the expenditure of Federal funds to reimburse the States for a part of their costs for acting as agents. In 1969, nineteen States agreed to serve as DOT agents. DOT, *Federal-State Relations in Gas Pipeline Safety, supra*, at 10. In 1972, twenty-two States were so serving.[5]

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[4] See, *e.g.*, DOT, *Third Annual Report of the Secretary of Transportation on the Administration of the Natural Gas Pipeline Safety Act of 1968, Calendar Year 1970*, Appendix 8.

[5] DOT, *Fifth Annual Report of the Secretary of Transportation on the Administration of the Natural Gas Pipeline Safety Act of 1968, Calendar Year 1972*, Appendix 13.

The West Virginia Commission has been, and is, participating in the national pipeline safety program both by certification under Section 5 of the 1968 Act (49 U.S.C., Sec. 1674) and as an agent of the DOT in exercising surveillance over the safety programs of the interstate pipelines, including those of the Petitioners.

Pursuant to West Virginia law (W. Va. Code Ann., Sec. 24B-5-3), the West Virginia Commission assessed fees of $2,375.33 against Tenneco and $1,077.44 against Texas Eastern. On July 29, 1971, the West Virginia Commission entered orders making those two companies respondents in proceedings to investigate their failure to pay the assessments. The companies appeared before the Commission to challenge the Commission's jurisdiction and, prior to the filing of reply briefs in that proceeding, initiated this suit in the District Court.

In a letter dated February 17, 1972, reprinted in Appendix of Petition, pp. A-23 through A-25, Joseph Caldwell, then Acting Director of OPS, stated that the position taken by the DOT in previous correspondence concerning the legality of fees assessed by States under State law on interstate pipelines ". . . was an impediment to cooperation between State and Federal authorities. . ." and that such cooperation was necessary in the administration of the Act of 1968. Referring to the authority of the States to "tax, assess, or impose fees on interstate operators," Mr. Caldwell further stated ". . . it is the Department's position that in adopting the Act [of 1968] Congress did not either expressly or impliedly preempt the power of the States to raise funds." Pet., App., at A-24.

Judge Hall of the United States District Court for the Southern District of West Virginia agreed that State law authorizing assessments against the companies was not

preempted by the Act of 1968. Pet., App., pp. A-13 through A-16.

The United States Court of Appeals for the Fourth Circuit also agreed ". . . that West Virginia's pipeline assessment law fosters state-federal cooperation" (Pet., App., at A-5) and, after an exhaustive examination of the legislative history surrounding the passage in 1972 of amendments to the 1968 Act, further concluded that ". . . the legislative history of the 1972 amendment indicates that Congress was willing to allow the states to select the most feasible means of financing the balance of their costs in light of their own tax structures and budgetary requirements." Pet., App., at A-8.

After the Court of Appeals denied the companies' Petition for Rehearing, the companies filed a Petition for Certiorari with this Court raising, once again, the issue of preemption.

REASONS FOR DENYING THE WRIT

I. THERE IS NO SUBSTANTIAL FEDERAL QUESTION INVOLVED

The primary issue involved in this case is extremely narrow. It has not changed from that raised before the Court of Appeals below:

> This appeal raises the narrow issue of whether the Natural Gas Pipeline Safety Act of 1968 has preempted the field of safety regulation of interstate gas pipelines to the extent that a state, which has qualified as an agent of the Department of Transportation, may not assess fees against the interstate lines to help defray the cost of administering the pipeline safety program.
>
> Pet., App., at A-2.

Although the companies, primarily by innuendo, seem to suggest that the assessment of fees under State law poses a grave threat to interstate commerce which requires rectification by this Court, it is important to note that even the companies did not consider the constitutional issues substantial enough to require the convening of a Three-Judge District Court under 28 U.S.C., Sec. 2281. Pet., App., at A-13. Nor did the companies raise before the Court of Appeals any contentions that the West Virginia fees unconstitutionally burden interstate commerce under Article I, Section 8, Clause 3 of the United States Constitution. Pet., App., at A-3.

There is, further, no question in this case concerning a potential conflict between Federal and State gas pipeline safety standards that may affect the public interest in the safe transmission of gas either within a State or across State lines. Petitioners make no such contention, and rightly so; for it is universally agreed that effective State participation in the Federal gas pipeline safety program is absolutely essential to the protection of that same public interest. To that end, the West Virginia's pipeline assessment law fosters the State-Federal cooperation that is necessary for the implementation of the national program. Pet., App., at A-5. See, generally, DOT, *Federal-State Relations in Gas Pipeline Safety, supra.*

The amount of money involved in the instant case is quite insignificant – $2,375.33 in fees assessed against the petitioner Tenneco, Inc. and $1,077.44 assessed against Texas Eastern Transmission Corporation. Petitioners agree that the "amount of the fees involved in this case is relatively small" (Pet., at 10), but suggest that the impact of the decision may be large if States that assess

fees apply "New York's formula." Obviously, such a possibility is purely hypothetical. "New York's formula" is not involved in the instant case. Nor, for that matter, is "West Virginia's formula," as the Court below noted. Pet., App., at A-3.

The issue raised by petitioners concerning the administrative construction of statutes (Pet., at 16) is clearly insubstantial and warrants no further attention by this Court. There is no question that it is appropriate for the courts to give weight to a construction of a statute by the agency charged with the task of construing it. *Zemel v. Rusk*, 381 U.S. 1, 11, 14 L. Ed.2d 179, 187, 85 S. Ct. 1271 (1965). In addition, a complete reading of the opinion of the Court of Appeals below (Pet., App., pp. A-1 through A-10) demonstrates conclusively that the Court's holding on the preemption issue was not controlled by DOT's construction of the 1968 Act. In that opinion, the DOT's interpretation was referred to only after the Court independently found ". . . in the 1972 Amendment and in its legislative history no unmistakable Congressional intention to bar states from assessing pipelines to pay the remaining fifty percent of the states' expenses." Pet., App., at A-8.

II. THERE IS NO CONFLICT OF DECISION

There is no conflict among the lower courts of the issues involved in this proceeding, which require resolution by this Court.

Both the District Court and a unanimous Court of Appeals below found that West Virginia law authorizing the assessment of fees against gas pipeline companies has neither expressly nor impliedly been preempted by Congressional passage of the Natural Gas Pipeline Safety Act

of 1968, as amended. The Department of Transportation is in full agreement with the lower Courts on this issue. See Letter of Joseph P. Caldwell, Acting Director, Office of Pipeline Safety, dated February 17, 1972, reprinted in the Appendix of the Petition, pp. A-23 through A-25.

III. THE WEST VIRGINIA COMMISSION IS NOT PREEMPTED BY THE ACT OF 1968 FROM ASSESSING AND COLLECTING FROM INTERSTATE PIPELINES A SPECIAL FEE TO AID IN DEFRAYING THE COST OF ADMINISTERING AN INTERSTATE PIPELINE SAFETY PROGRAM AS THE AGENT OF DOT.

As this Court has recently noted:

> . . . each [preemption] case turns on the peculiarities and special features of the federal regulatory scheme in question. Cf. *Hines v. Davidowitz*, 312 US 52, 85 L Ed 581, 61 S Ct 399; *Huron Portland Cement Co. v. Detroit*, 362 US 440, 4 L Ed2d 852, 80 S Ct 813, 78 ALR 2d 1294.
>
> *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 264, 36 L. Ed.2d 547, 556, 93 S.Ct. ___ (1973).

The federal scheme in question in this case involves a natural gas pipeline safety program with two major features: the setting of minimum federal safety standards (49 U.S.C., Sec. 1672) and effective State participation in the administration of the program (see, especially, 49 U.S.C., Sec. 1674).

Federal-State cooperation is a *sine qua non* of the federal gas pipeline safety scheme. See, generally, DOT, *Federal-State Relations in Gas Pipeline Safety, supra.*

For the States to participate, they must be able to raise funds under State law, 49 U.S.C., Sec. 1674(c)(1). The initial 1968 version of 49 U.S.C., Sec. 1674(c)(1) is reprinted in the Appendix of this brief at 1a. The 1972 amended version is reprinted in the Petition at A-26. Concerning the funding of State programs for acting as agents of the DOT in the surveillance of interstate pipelines, Congress did not authorize the appropriation of any Federal funds for such a purpose until 1972. Section 2 of P.L. 92-401 (86 Stat. 616) (49 U.S.C., Sec. 1674(c)(1), as amended). When it did make an authorization for that purpose it authorized reimbursement to the States only "up to 50 per centum of the cost." *Id.*

Clearly, then, the availability of State funds, raised under State law, is an essential ingredient of the federal scheme for regulating the safety practices of all gas pipeline facilities in the country, including those facilities that are transmitting gas in interstate commerce.

In support of their preemption contention, the gas companies cite two cases: *Ingels v. Morf*, 300 U.S. 290, 81 L. Ed. 653, 57 S. Ct. 439 (1937) and *Kentucky Natural Gas Corporation v. Public Service Commission*, 28 F. Supp. 509 (E.D. Ky., 1939), *aff'd per curiam*, 119 F.2d 417 (6th Cir. 1941).

Neither case is applicable to the facts and circumstances of the instant case.

Both cases involved considerations of State action that were deemed to burden interstate commerce unconstitutionally. The Court of Appeals below noted that such considerations are not involved in this case. Pet., App., at A-3.

Ingels involved a California statute which required a permit, for which a fee of $15 was exacted, for each motor vehicle brought into the State for the purpose of selling the vehicle to a purchaser located either inside or outside the State. A similar permit, with fee, was not required for like, intrastate traffic. The fees collected were paid into the general fund of the State treasury and were also found to be unreasonably in excess of the costs to the State for enforcing the provisions of the statute. 300 U.S. 297, 81 L. Ed. 659.

In the *Kentucky Natural Gas* case, the Kentucky Public Service Commission asserted jurisdiction over the facilities and practices of a gas company subject to FPC jurisdiction and attempted ". . . in all respects to regulate complainant's business in Kentucky as an intrastate utility." 28 F. Supp. 512. The Court held that such plenary regulatory authority did not lie with the Commission, and that assessments levied on the basis that the Commission had such plenary authority could not be sustained.

In the instant case, the West Virginia Commission is not asserting that its authority to assess fees against the companies derives from any plenary authority over the companies' gas pipeline safety practices. Its authority to assess fees stems from the fact that it is acting as an agent of the DOT in exercising surveillance over interstate pipelines, and from the fact that the West Virginia legislature has authorized it to engage in the national gas pipeline safety program "to the extent permitted by the 'Act of 1968' and any amendments thereto." W. Va. Code Ann., Sec. 24B-2-1. The validity of its agency relationship with the DOT is not contested.

Further, in contrast to the facts in *Ingels*, the West Virginia legislature required that fees be assessed on both intrastate and interstate pipeline to produce a revenue of not more than $90,000 annually [W. Va. Code Ann., Sec. 24B-5-3(a)], and that the assessments collected must be placed into a special fund for the sole purpose of meeting the costs of the West Virginia Public Service Commission to participate in the pipeline safety program [W. Va. Code Ann., Sec. 24B-5-3(b)].

As this Court noted in *Ingels*, justification for the exaction by a State of a money payment ". . . may appear from the statute itself (citations omitted) or from the use of the money collected to defray such [State] expense." 300 U.S. 294, 81 L. Ed. 658. Both such justifications are clearly evident in this case.

The companies' use of legislative history in an attempt to "prove" its preemption argument amounts to no more than an abuse of such history.

As this Court noted in *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 443, 4 L.Ed.2d 852, 856, 80 S. Ct. 813 (1960):

> In determining whether state regulation has been preempted by federal action, "the intent to supercede the exercise by the State of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the state." *Savage v. Jones*, 225 U.S.

501, 533, 56 L. Ed. 1182, 1195, 32 S. Ct. 715.

The issue in this case is whether federal preemption as to the setting of safety standards applicable to interstate transmission facilities [49 U.S.C., Sec. 1672(b)] should be implied as to the assessment of special fees. Nothing in the legislative history indicates such an intent.

In regard to the funding provisions adopted in the original 1968 Act, the section of the Report of the Committee on Interstate and Foreign Commerce dealing with such provisions[6] shows clearly: 1) The Committee was not addressing any of its remarks to the manner in which States raised funds to participate in the program; 2) The Committee knew that the continued expenditure of State funds was absolutely essential for the effective implementation of the national safety program; 3) The Committee's prime preoccupation was with the level of funds required by the DOT; 4) The Committee concluded that the DOT did not require $25 million annually for the new program and recommended that the DOT be authorized to expend only $500,000, $2 million and $3 million during the succeeding three fiscal years; and 5) The Committee in no way concluded that an assessment of fees by the Federal government on gas companies would be an undesirable shifting of the burden onto ratepayers. What the Committee did conclude was that an assessment by the DOT of fees to cover *Federal* expenditures was unnecessary at that time, given the relatively small amount of funds it was

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[6] H.R. Rep. No. 1390, *U.S. Code Cong. & Adm. News, supra,* 3253-3255, reprinted in its entirety in Appendix B of this brief at 2a.

recommending for Congressional authorization, and that ". . . *when any collection of [Federal] fees is authorized,* they should be covered into the Treasury and the expenses of the Secretary should be met through the usual route of authorized and appropriated funds." H.R. Rep. No. 1390, *supra,* at 3255. (Emphasis supplied.)

Concerning the legislative history surrounding the passage in 1972 of amendments to the Natural Gas Pipeline Safety Act of 1968, the companies confuse three separate issues that were under consideration by Congress and involved funding arrangements for the safety program. They were:

1) Shall Congress authorize the expenditure of Federal funds to pay to a State up to 50 per centum of the cost incurred by a State for acting as agent of the DOT in the administration of the interstate pipeline safety program? The answer to that question was in the affirmative. See H.R. Rep. No. 92-1322, *U.S. Code Cong. & Adm. News,* 92d Cong., 2d Sess. 3064, 3066 (1972), an extract of which is reprinted as Appendix C of this brief at 6a.

2) Shall the DOT be required to disburse appropriated funds for the State grant-in-aid program or should the DOT be allowed to impound such funds? Congress mandated disbursement, but allowed the DOT to withhold funds from a particular State agency under very restricted circumstances. See H.R. Rep. No. 92-1322, *Id.*

3) Shall the States be specifically authorized *under Federal law, as distinguished from State law,* to assess fees against interstate pipeline companies to pay costs incurred by the States when acting as agents of the DOT?

To this third question the Congress put off for another time any definitive answer. The issue proposed was novel: shall Congress, *under Federal law,* authorize State agencies to assess fees against interstate pipelines in an attempt to

buttress State capabilities for participating in the national program? The idea for direct Federal authorization to a State agency to assess fees as one element of a national program was initially conceived by the Administration and introduced in its proposed Power Plant Siting Act of 1971.[7] The NARUC thought the idea had merit and should be made part of the national gas safety program. It, thereupon, proposed to the Senate Committee on Commerce that the 1968 Safety Act be amended to incorporate the concept.

The text of NARUC's proposed amendment is set out in Appendix D of this brief at 8a.

The rationale for the NARUC proposal on funding is clearly explained in a letter from NARUC President Francis Riordan to Chairman Warren G. Magnuson of the Senate Committee on Commerce, dated May 18, 1972:

> (1) A new Subsection (e) should be added to Section 5 of the Act (of 1968) to authorize a State agency to assess distribution and interstate pipeline systems to pay the additional cost needed by a State agency to develop the type of safety program required to adequately protect the public.* *Such a supplemental source of revenue is needed because Congressional grant-in-aid appropriations have been inadequate, and are likely to remain so, and because some State agencies have difficulty in obtaining sufficient State funds for gas safety purposes.*

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* This authorization for *State assessment under Federal law* is similar to that proposed to fund State participation under Section 12 of the Administration's power plant siting legislation (S. 1684, H.R. 5277, 92nd Congress). (Emphasis supplied.)

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[7] S. 1684 and H.R. 5277, Section 12, 92d Congress.

The Senate Commerce Committee understood the import of NARUC's proposal, as is evident in the Committee's comments, to wit:

> Amendments proposed by the National Association of Regulatory Utility Commissioners to permit States to set safety standards more stringent than Federal minimum standards . . . *and to permit States to assess pipelines to fund their safety programs (if funding from other sources is inadequate)* were put before the Committee. . . . These proposed amendments are worthy of consideration and it is the intent of the Committee to undertake consideration of them at a later date in its continuing effort to insure an effective pipeline safety program.
>
> Sen. Rep. No. 92-829, *U.S. Code Cong. & Adm. News*, 92d Cong., 2d Sess. 3049, 3055 (1972). (Emphasis supplied.)

Congress made no determination in 1972 to disturb then-existing State methods for funding their participation in the program. Congress, in fact, at that time asked for a one-time survey report from the DOT of State funding practices and needs. Section 5 of P.L. 92-401 (86 Stat. 616) (49 U.S.C.A., Sec. 1674 n.), reprinted in Appendix E of this brief at 10a. The DOT found that the States are employing a wide variety of funding devices, including assessment of fees. DOT, *Federal-State Relations in Gas Pipeline Safety*, *supra*, 32-35. No further action has been taken by Congress on NARUC's proposal. Nor has the Congress taken any action since the submission of the DOT report to indicate a clear intent on its part to stop the West Virginia Commission, or any other State agency acting as an agent of the DOT, from assessing fees against interstate pipelines when authorized to do so under State law.

The Court of Appeals below thoroughly reviewed the same legislative history and arrived at the following conclusion: "The fact that Congress chose not to enact legislation that would authorize state regulatory commissions to assess interstate pipelines under federal law does not establish that Congress intended to prohibit such assessments under state law." Pet., App., at A-8. That conclusion is cleary correct.

In addition, the West Virginia assessments against the companies certainly meet the following test prescribed by this Court in *Scripto, Inc. v. Carlson*, 362 U.S. 207, 210, 4 L. Ed.2d 660, 663, 80 S. Ct. 619 (1960):

> There must be, as our Brother Jackson stated in *Miller Bros. Co. v. Maryland*, 347 US 340, 344-345, 98 L ed 744, 748, 74 S Ct 535 (1954), "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari to the Court of Appeals for the Fourth Circuit should be denied.

Respectfully submitted,

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